Case Nos. 14-1241 and 14-1257

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

HOTEL BEL-AIR,

***Petitioner*,**

v.

NATIONAL LABOR RELATIONS BOARD,

***Respondent*.**

PETITION FOR REVIEW OF A DECISION BY THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S INITIAL BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) The parties in this Court are Petitioner Hotel Bel-Air and Respondent National Labor Relations Board ("NLRB"). There are no intervenors or amici.

(B) The agency action under review is the Decision and Order issued by the National Labor Relations Board in the matter of Hotel Bel-Air and UNITE HERE, Local 11; Case No. 31-CA-029841 (rel. October 31, 2014).

(C) Related Cases: This case was previously before this Court on petition for review of the earlier decision by the Board (rel. September 27, 2012; cases nos. 12-1386 and 12-1404 in this Court). That decision was vacated by NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). On October 31, 2014, the current Board issued the decision which is the subject of this present petition for review.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and D.C. Cir. R. 26.1, *et seq.*, Appellant hereby certifies that the Appellant, Hotel Bel Air, is 100% owned by Kava Holdings, Inc., a company devoted to the ownership and management of hotels. Kava Holdings, Inc., is in turn owned by Brunei Investment Agency. The Hotel Bel-Air is managed by Dorchester Collection, a United Kingdom based company. None of these entities are publicly held companies.

/s/ Karl M. Terrell
Karl M. Terrell

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** There are no authorities upon which the Petitioner principally relies.*

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JURISDICTIONAL STATEMENT

The National Labor Relations Board had jurisdiction of this case pursuant to 29 U.S.C. §§ 153 and 160(b) and (c), based on a filing of an unfair labor practice charge by UNITE-HERE Local 11 with the Board's Region 31 and the subsequent issuance of a complaint against the Petitioner by the Regional Director. The Board issued a final decision on October 31, 2014, and the Petitioner timely filed a Petition for Review on November 10, 2014, pursuant to 29 U.S.C. § 160(f), providing jurisdiction to this Court.

STATEMENT OF THE ISSUES

Whether Respondent erred in finding that 1) Petitioner had not reached a genuine impasse in negotiations with UNITE HERE, Local 11, over the effects of the closure of Petitioner's facility, and 2) that the Petitioner's implementation of its severance proposal of April 9, 2010 accordingly constituted direct dealing with the employees.

STATUTES AND REGULATIONS

Pertinent statutes are set forth in the attached addendum: 29 U.S.C. § 153 and 29 U.S.C. § 160.

STATEMENT OF THE FACTS

A. The Parties Commence Bargaining After the Hotel's Decision to Close for Renovations.

The Hotel Bel Air is a luxury, five-star establishment that has been catering to guests in Los Angeles since the 1940s. In 2008, the Hotel's ownership changed hands, and the Dorchester Collection, a London-based hotel management company, assumed responsibilities for the Hotel (the owner and management company are referred to herein, collectively, as the "Hotel" or "Petitioner"). Record Vol. II, GC Ex. 38; Record Vol. I, Transcript ("Tr.") 192.[1]

The Hotel's property was in need of significant capital improvements to maintain its luxury status and ratings. In July 2009, a decision to close its doors for extensive renovations was announced. Vol. II, Resp. Ex. 6. Timely WARN Act notices were issued to employees, to the appropriate government officials, and to the Union – charging party UNITE-HERE, Local 11 – stating the closure was expected to take place on September 30, 2009. *Id*. Approximately 220-225 hotel employees were represented by Local 11. Vol. I, Tr. 186. The collective bargaining agreement between the Hotel and Local 11 was also scheduled to expire on September 30, 2009. Vol. II, GC Ex. 3.

The Hotel offered to bargain with Local 11 over the effects of the closure. Vol. II, GC Ex 5. Around the same time, on July 24, Local 11 sent notice of its desire to terminate the current contract and negotiate a new one. Vol. II, GC Ex. 4. Although the exact length of the closure was unknown, it was believed the renovations would take approximately two years to complete. Vol. II, Resp. Ex. 6.

B. *The Soon-to-Expire Collective Bargaining Agreement Did Not Provide For Any Severance Pay, and Severed the Employment Relationship After Nine Months Of Layoff*.

The parties' collective bargaining agreement ("CBA") provided that seniority and the employment relationship would terminate after nine months of layoff. Vol. II, GC Ex. 3, p. 31, § 22(G)(3) ("Seniority shall be broken and employee status shall cease upon: . . . Continuation upon layoff status for a period of nine (9) months or the length of his seniority, whichever is less."). Consequently, the Hotel's closure on September 30, 2009 had the practical effect of severing all employees as of June 30, 2010, and had the further practical effect of ending active employment with no effective recall rights as of the day of closure, in view of the projected two-year shut-down.

The collective bargaining agreement did not contain a provision for severance pay. *See* Vol. II, GC Ex. 3; Vol. I, Tr. 253. Recognizing that laid-off

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[1] Citations to the Record will hereinafter consist of a reference to the Volume number (e.g., Vol. I), followed by a specific reference to an exhibit (e.g.,

employees would not be recalled under the CBA, Local 11 requested and the Hotel agreed to offer separation pay. *See e.g.*, Vol. II, GC Exs. 6 & 40; Vol. I, Tr. 562-563. The Hotel believed that resolving the amount of severance pay was urgent in view of the impending termination of active employment. Vol. I, Tr. 559-560.

C. *Despite the Urgency of the Severance Issue, Local 11 Insisted on an Unacceptable and Unrealistic "Me-Too" Agreement, and Made Patently Excessive Demands for Severance Pay*.

The First Two Meetings Revealed That the Parties Had Entirely Different Priorities. Local 11 and the Hotel met for the first time on August 25, 2009 in the presence of many of the bargaining unit members. Vol. I, Tr. 560. Local 11 presented a one-page demand calling for the Hotel to enter into a new CBA that would "incorporate all other improvements to the Collective Bargaining Agreement as is agreed to by the other Hotel Employers represented by Local 11 [including wage increases] in order to preserve the city-wide standard." Such agreements are referred to sometimes as "me-too" agreement. Vol. II, GC Ex. 6; Vol. I, Tr. 561. Local 11 also demanded an unspecified "payment to all employees affected by the proposed closure of the Hotel," payment of the full cost of medical coverage during the entire closure, and a twenty-four month layoff/recall rights. Vol. II, GC Ex. 6.

Resp. Ex. 6) or transcript page (e.g., Tr. 111). F.R.A.P. 28(e).

The Hotel rejected Local 11's proposal for a "me-too" CBA, requiring automatic acceptance of provisions agreed to by other hotels, Vol. I, Tr. 562-563, and explained further that it would be difficult to agree to any new contract prior to re-opening, given the extensive nature of the planned renovations and accompanying potential changes to job classifications and responsibilities. Vol. I, Tr. 263, 300-301, 562-563. However, the Hotel agreed to provide all employees with separation pay and proposed one week of pay per year of service with a cap of 26 weeks. Vol. II, GC Ex. 40; Vol. I, Tr. 563. Local 11 did not make a counterproposal to the Hotel's offer, Vol. I, Tr. 564, and stated only to the Hotel that they "want more money." Vol. I, Tr. 264, 697.

The parties set a second meeting for September 3, 2009. Vol. I, Tr. 564. At this meeting, also in the presence of bargaining unit members, Local 11 presented the Hotel with a new one-page demand almost identical to its August 25 demand. *Compare* Vol. II, GC Ex. 7 with Vol. II, GC Ex. 6; *see also*, Vol. I, Tr. 564. The only change was the addition of a specific demand for severance pay — an extraordinarily unrealistic "*three (3) months* of wages for each year of service for all employees." Vol. II, GC Ex. 7 (emphasis added); Vol. I, Tr. 564. The Hotel responded that it had many employees with more than 10 years of service. These employees, under this proposal, would receive 30 months or more of pay, thus exceeding the expected length of the closure. Vol. I, Tr. 265-266, 564. Local

11's proposal continued to make the same demand for a "me too" contract, the same demand for medical coverage, and other provisions. Vol. II, GC Ex. 7. The Union justified these proposals, as stated in testimony, on the basis that their primary concern was for those employees who wanted to return when the Hotel re-opened — not those who preferred severance pay. Vol. I, Tr. 385.

Thus, from the outset, the parties were many millions of dollars apart. The Hotel rejected Local 11's demand. Vol. I, Tr. 565.

In addressing Local 11's request for interim medical coverage, the Hotel asked Local 11 to provide information about the health and welfare plan (since it was a Union-sponsored Taft-Hartley, multi-employer plan effectively controlled by Local 11). The Hotel inquired also concerning the COBRA options available to employees (Vol. I, Tr. 270, 320-321, 378, 565, 703-708), explaining that the federal stimulus package, then in place, provided a subsidy that could pay 65% of the COBRA-continuation cost, and that the Hotel would be willing to assist employees in this connection. Vol. I, Tr. 565-566. The Union refused, however, to provide this information, and simply demanded the Hotel obtain this information on its own (even though the Union negotiators at the table were trustees of the Plan). *Id*. Karine Mansoorian, Local 11's chief negotiator, admitted she never made any effort to obtain this information, Vol. I, Tr. 375, despite the fact such an effort could have helped in resolving differences. Vol. I, Tr. 674-675, 706.

A Federal Mediator Is Unable to Bring the Parties Significantly Closer.

Given the Union's illogical demands and unreasonable positions, the Hotel contacted the assigned federal mediator and made arrangements for his attendance at the third bargaining session, which occurred on September 11. Vol. I, Tr. 274 and 566. No agreements were reached.

A fourth meeting, once again with the mediator, was then scheduled for September 18. Following the mediator's request, the Hotel made a proposal which increased the amount of severance pay to two weeks per year of service for non-tipped employees, and double that amount for tipped employees. Vol. II, GC Ex. 8; *see also*, Vol. I, Tr. 26, 200, 567-568. The Hotel also offered a lump sum of $900 for use toward continuing medical coverage. Vol. II, GC Ex. 8. Employees were free to use this money for any purpose, including self-pay or COBRA coverage, which in many cases would be less expensive given the availability of government COBRA subsidies, as noted above. Vol. II, GC Ex. 8; Vol. I, Tr. 566.

The Union, in response, demanded eight (8) weeks of severance per year of service for non-returning employees, and six (6) weeks for those obtaining a guaranteed right to return. Vol. I, Tr. 277, 281-282. This was no more than a minor movement on the part of the Union, in that the Union was continuing to demand that employees be paid both a severance *and* receive a guaranteed right of recall, and in view of the fact that – at eight (8) weeks – many employees would

likely receive more during the closure than they would if they were working. Further, the demands from neither side conditioned receipt of severance pay on being unable to find work elsewhere, and thus the severance pay sought by the Union, at the 8-weeks-per-year level, would have resulted in an enormous windfall for many employees. Acknowledging the unrealistic nature of this proposal, Union negotiator Mansoorian admitted the Union fully expected this proposal would be rejected (12 days prior to the hotel's closure). Vol. I, Tr. 278.

The parties were still millions of dollars apart. The Hotel listened, on September 18, to further recommendations by the mediator, but decided, and then communicated, that its last proposal was final. Vol. I, Tr. 200, 567. The Union made no new counterproposals in response; however, the parties scheduled another meeting for October 1, 2009.

Two days prior to the scheduled October 1 meeting, the Union accused the Hotel, by correspondence, of refusing to bargain for a new contract, and urged the withdrawal of its assertion that the September 18 proposal was its best and final. Vol. II, Resp. Ex. 11. The intent behind the letter, Mansoorian acknowledged, was Local 11's desire to obtain, simultaneously, a collective bargaining agreement and a severance pay agreement. Vol. I, Tr. 389-990 ("Yes, we wanted it at the same time"). The Hotel reiterated, in response, that the severance issue was more urgent due to the looming September 30 closure. Vol. I, Tr. 570.

D. *Local 11 Decides to Call in Local 6, and Then Refuses to Abide by Off-the-Record Proposals Made by Local 6*.

Prior to the October 1 meeting, Local 11 enlisted the assistance of UNITE HERE Local 6, in New York City, which represents the bargaining unit at the New York Palace Hotel (another hotel managed by the Dorchester Collection). Vol. I, Tr. 194-195. As a result, Local 6 commenced work slowdowns and stoppages at the Palace Hotel, and threatened to continue the stoppages unless Christopher Cowdray, Dorchester Collection's CEO, met with the President of Local 6, Peter Ward. Vol. I, Tr. 428-430.

Arch Stokes, the attorney for the New York Palace, facilitated meetings and discussions between the two men, who then devised a plan to break the impasse. Vol. I, Tr. 432-434. The plan held promise, as it involved an understanding that the parties would first resolve the severance issue before addressing a successor agreement, and included an understanding that employees who accepted severance pay would have no right to recall, while employees *rejecting* severance would be offered their jobs back upon reopening (subject to the same job remaining in place after the "renovation and restructuring of the [Hotel's] business model," as acknowledged by both Ward and Cowdray). This understanding was

memorialized in subsequent correspondence, dated October 6 and 16. Vol. II, Resp. Exhs. 1 & 2.

Ward's October 6 letter reflected a critical concession that Local 11 had refused to make: that employees who elected to receive severance pay would not have any right to recall. Vol. II, Resp. Ex. 1; Vol. I, Tr. 435. These agreements on severance pay were conditioned upon an agreement for subsequent meetings in New York to reach a collective bargaining agreement for when the Hotel re-opened. *Id*.

Although these discussions did not involve Local 11 directly, Mansoorian squarely admitted that Local 11 had authorized Ward to make these proposals to Cowdray. Vol. I, Tr. 282. Contrary to this fact, however, she insisted during a meeting with the mediator and the Hotel's counsel – in an "off the record" discussion on September 29 – that the employees receive both severance pay and guaranteed recall rights. Vol. I, Tr. 382, 385. Confirming this, Mansoorian's proposal dated October 7 – one day after Ward's letter – continued to make demand that the workers who "want to be guaranteed a position" would also receive severance pay. Vol. II, Resp. Ex. 3.

In short, although Peter Ward was authorized to agree, and did agree, to condition severance pay on a waiver of preferential hiring rights, Local 11 *never* agreed to this – not at this point in October, or at any point thereafter, as will be

seen below. *The Board and the ALJ failed to acknowledge this centrally important fact.*

Local 11 Reneges on a Key Concession Made on Its Behalf of by Peter Ward of Local 6. At the scheduled October 1 meeting between Local 11 and the Hotel – the fifth meeting, with 60-70 bargaining unit members in attendance (Vol. I, Tr. 201) – Local 11 reneged on the key understandings reached between Ward and Cowdray, as described and memorialized in the October 6 and 16 letters (Vol. II, Resp. Exhs. 1 & 2). Contrary to the understanding that only those employees who waive severance had a right to recall, Local 11 insisted on severance pay for all, including those with such a right. Vol. I, Tr. 383, 572.

For its part, the Hotel in the October 1 meeting – consistent with the Ward / Cowdray understanding – presented a written proposal stating that all "qualified employees who declined separation pay will be extended an offer of employment for available positions, before hiring from other sources." Vol. II, GC Ex. 9. The Hotel stated further on October 1 that its prior proposal of two weeks per year of service, plus the lump sum of $900, was the final proposal and that no more money would be offered. Vol. I, Tr. 572. The Union did not make any written proposals at this meeting.

On October 7, as noted above, Local 11 forwarded the written proposal which continued to disregard the Ward / Cowdray understanding. Vol. II, Resp.

Ex. 3. The Union demanded six weeks of severance pay per year of service for employees who choose to sever their employment – a demand three times higher than the Hotel's two-weeks-per-year offer of September 18 – and demanded, also, three weeks of severance pay for employees who would be "guaranteed a position" when the Hotel reopened. *Id.*; also in the record as GC Exh. 10. This demand was made even though Ward had agreed previously that those employees who choose severance would not have a right to recall, and even though the Hotel had repeatedly advised the Union that many of the job classifications would be modified or eliminated. The remainder of the Union's "contract" proposal was unchanged, including the "me-too" proposal. *Id.*

On cross examination, Local 11's negotiator Mansoorian could not come up with a credible explanation for the contradictory 'Ward versus Local 11' proposals, other than to assert that *both* were somehow authorized and on the table. Vol. I, Tr. 282-86 (stating, further, that while Ward's proposal was "authorized" for acceptance in the early October time frame, she never informed the employees of Ward's agreement that recall-eligible employees would not receive severance, and was unable to deny the contradictory nature of these proposals).

On October 15, 2009, the Hotel responded in writing to Local 11, reiterating that its September 18 severance pay offer was final. Vol. II, GC Ex. 11. The letter explained that "any employee who notifies the Hotel in writing that he or she does

not want to accept the severance pay offer will be placed on a preferential hire list and be assured of an offer of employment to an available position he or she is qualified to perform." *Id*. The letter articulated why the Hotel could not accept the Union's demand for guaranteed positions upon reopening: "[Y]ou are demanding that the Hotel agree to hire individuals even if they are not qualified to perform the available jobs. The Hotel cannot agree to hire unqualified individuals." *Id*. The letter explained, further, why the Hotel could not accept a "me-too" contract; *i.e*., why it could not accept any and all unknown and uncertain future contract terms Local 11 might negotiate with other employers, especially as the Hotel did not yet know which job classifications would even be available. *Id*.

On November 2, 2009, Local 11 sent another letter accusing the Hotel of refusing to bargain over a collective bargaining agreement. Vol. II, GC Ex. 12. Two days later, the Hotel responded to this mischaracterization, explaining that the Union had not once varied its proposal for a me-too agreement. Vol. II, GC Ex. 13. The Hotel stated further that the "effects" bargaining was more urgent than agreement on a successor CBA because the Hotel would be closed for two years and it was unclear what positions would be available on re-opening. Vol. II, GC Ex. 13; Vol. I, Tr. 207.

On November 16, the Hotel advised the Union that since it had not accepted or provided a counter-offer to its severance pay proposals, it believed that the

Union had no other proposals to make on the effects-bargaining issue. Vol. II, Resp. Ex. 9. It was clear at that point that the parties had deadlocked.

The primary driving force behind the deadlock was Local 11's determination not to resolve the severance pay issue unless the Hotel agreed to a successor CBA.[2] Nonetheless, as shown below, the Hotel acting in good faith *did* engage in negotiations over a successor CBA, but never wavered from its position that severance was the urgent issue and should not be tied to simultaneous agreement on a new CBA. For its part, the Union maintained a hard stance on severance terms, and never relinquished its position of refusing a severance deal absent agreement on a successor CBA.

The Parties Once Again Sought Help From Local 6. In an attempt to break the deadlock, the parties met for off-the-record discussions in New York City on February 4-5, 2010. The meeting was attended by representatives of both Local 6 (Peter Ward and Richard Maroko) and Local 11 (Karine Mansoorian and Tom Walsh). Vol. I, Tr. 22-23, 578. The Hotel was represented by George Preonas (attorney for the Hotel), Tim Lee (General Manager of the Hotel), as well as Arch Stokes and Peter Fischer (attorneys for the New York Palace Hotel). *Id*.

[2] On September 21, 2009 and November 24, 2009, Local 11 filed unfair labor practice charges alleging that the parties were at impasse and that the Hotel had refused to bargain over a new agreement. Vol. II, Resp. Exs. 17-18; *see also* Vol. II, Resp. Ex. 19. These charges were later withdrawn.

At the beginning of the discussions, the parties agreed these were to be "off-the-record" meetings, solely for the purpose of exploring whether an agreement could be achieved consistent with the October correspondence between Ward and Cowdray. Vol. I, Tr. 439-440, 579. The parties agreed also there would be no need to take notes or have any formal record of the meetings. Vol. I, Tr. 440.

The vast majority of the February 4 discussions dealt with the terms of a new CBA that would be in place when the Hotel opened in 2011. Vol. I, Tr. 24, 581. The Hotel's negotiators explained that the economic viability of its operations required a significant restructuring of the agreement, and that it would be difficult to negotiate a new agreement when the Hotel did not know what employees and positions would be available when it re-opened. Vol. I, Tr. 438, 581. The Hotel suggested that it would be easier to break the impasse if the discussions were first focused on severance pay. Vol. I, Tr. 440-441. However, the Union continued to insist on negotiating a package deal involving both severance and a new CBA. Vol. I, Tr. 440, 446, 581. The Union then proceeded to reject nearly all of the Hotel's suggested changes to the contract language, including those which merely eliminated duplicative or inconsistent provisions. Vol. I, Tr. 585. At the request of the Union, the parties went through the entire contract and identified those provisions not in dispute and acceptable to both sides. Vol. I, Tr. 581-583.

On February 5, while Walsh and Mansoorian were present, Ward made a new verbal demand for severance pay in the amount of four (4) weeks per year of service for non-tipped employees (and double that amount for tipped employees). Vol. I, Tr. 26-27, 101, 211-212, 588. Although this was still two times the Hotel's final offer, Ward conceded that employees who accepted severance would have no right to be rehired. Vol. I, Tr. 116; 212; 450-451, 588. Local 11 asserted that at least 80% of the bargaining unit would reject any amount of severance pay and come back to work for the Hotel.[3] Vol. I, Tr. 591. With modest progress having been made, however, Local 11 and the Hotel agreed to meet again in Los Angeles on February 10. Vol. I, Tr. 453-454.

Local 11 Once Again Ignores the Agreement Reached in New York. Local 11 and the Hotel met as scheduled on February 10, at Local 11's hall in Los Angeles. Vol. I, Tr. 214, 591. As many as 60-70 employees were also present for this meeting, but no representatives of Local 6 were present. Vol. I, Tr. 214, 591. In this "*on* the record" bargaining session, the parties once again went through the expired agreement and identified contract provisions not in dispute. Vol. I, Tr.

[3] In fact, Local 11's own internal survey suggested the opposite: that a majority *would* accept severance. And, in fact, a substantial majority *did accept* the severance that was offered when the Hotel ultimately implemented its last, best, and final severance proposal. Vol. II, Resp. Ex. 12; Vol. I, Tr. 240.

592-593. There was no mention of the "off the record" meetings in New York. *Id*. However, the Hotel's negotiators, in this meeting, stated "on the record" the same positions it had taken in New York. *Id*. In contrast, when it came to the issue of severance pay, Local 11 made a new verbal demand for severance pay that plainly disregarded, and dramatically differed from, the proposal made off-the-record in New York just five days earlier. Vol. I, Tr. 593. Specifically, Local 11 demanded the Hotel pay five (5) weeks of pay per year of service for all employees (an *increase* from the four-weeks proposal made earlier in New York), and 2.5 weeks of pay per year of service to any employee who wished to be guaranteed a right of rehire. Vol. I, Tr. 215; 220, 593-595. Local 11 also demanded 16 months' worth of contributions to the Union's health and welfare plan on behalf of all 220 bargaining-unit employees that had been laid off. [4] *Id*.

The Hotel was surprised, to say the least, by the Union's change in position. Preonas privately questioned Mansoorian as to why Local 11 was demanding that

[4] Less than a month later, on March 1, 2010, the Union provided the Hotel with a one-page document representing a portion of the health and welfare trust document. Vol. II, Resp. Ex. 10. In direct contradiction of Local 11's proposals, the document revealed that contributions *cannot* be continued for longer than 12 months after eligibility has terminated. *Id*. This was clear evidence that the Union was not bargaining in good faith when it demanded 16 months' worth of contributions.

the Hotel — but not the Union — be bound by the discussions in New York. Vol. I, Tr. 596. Mansoorian stated simply that she "had to do it this way." *Id.* [5]

The parties were still literally millions of dollars apart and with no agreement in sight, especially as this was the second time Local 11 had reneged on proposals by Local 6 made during off-the record discussions. Vol. I, Tr. 458, 598.

The Hotel Made One Last Attempt to Reach Agreement by Proposing a "Last, Best and Final" Offer. In March 2010, some six week after the February 10 meeting, and six months after the employees of the Hotel had been laid off, Mansoorian left Preonas a voice message stating that Local 11 wanted to meet, because she had "heard there was more money." Vol. I, Tr. 598. After an exchange of correspondence, the parties agreed to meet on April 9, 2010. Vol. I, Tr. 599. On March 29, Local 11 sent a short email containing counterproposals to the many open contract items that remained after the February 10 meeting. Vol. II, GC Ex. 18. Severance was not mentioned at all in the March 29 email. *Id.* Nonetheless, based on Mansoorian's message that the union had "heard there was

[5] At the hearing, Mansoorian explained her change in position by claiming that this was simply an attempt to "posture" in front of the employees and lower their expectations. Vol. I, Tr. 215. How a *higher* demand can be expected to *lower* employee expectations is anyone's guess. Furthermore, she never advised the Hotel what she claimed at the hearing, that this was just a charade intended to deceive the workers and that she intended to abide by the prior understandings. Vol. I, Tr. 330, 596. This is further evidence

more money," the Hotel decided to make one last effort to resolve the severance issue.

At the April 9 meeting, the Hotel increased its prior offer from two (2) weeks' pay per year of service to two and a half (2.5) weeks per year of service. Vol. I, Tr. 600-601. The Hotel prepared a new Separation Pay Plan, individualized releases for all employees showing the amount of severance pay each would receive, and individualized payroll checks for the full amount of the offered severance pay for each employee. *Id.* The Hotel presented the revised proposal along with the checks and the releases at the meeting on April 9. Vol. I, Tr. 218-219, 599-601.

The Union rejected the Hotel's proposal and provided an oral counterproposal that reduced, only slightly, their prior demand for severance pay. The Union moved from five to four and a half (4.5) weeks of severance per year of service for employees choosing to sever the employment relationship, and continued to insist on severance for employees who wanted to return to work upon re-opening (though moving from two to two and a half weeks, for this category to which the company had never agreed). Vol. I, Tr. 219-220; 223, 604. The Union

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both of the Union's bad faith and of the fact that Local 11 treated the "off the record" discussions in New York as time-wasting charades.

demanded also 12 months' of health and welfare contributions for the severed employees. *Id*.

Thus, on April 9, 2010, some two months after the February 5 "off the record" meeting with Local 6 in New York, and six months after Ward's October 6 letter to Cowdray, Local 11 continued to disavow the off-the-record commitments made by Ward. The parties remained several millions of dollars apart.[6] Local 11 never abandoned its position that employees who received severance pay should nonetheless be guaranteed recall, and that there could be no agreement on severance without resolving the issue of a new contract when the Hotel re-opened.

On April 12, 2010, the Hotel rejected Local 11's counterproposal and reiterated that its April 9 proposal was its "last, best, and final offer." Vol. II, GC Ex. 19. Thereafter, Local 6 asked the Hotel to keep its offer open longer than proposed, until Ward could come to Los Angeles for a meeting. The Hotel agreed. Vol. I, Tr. 455-56 and 607; Vol. II, GC Ex. 20. Ward and Local 6's general counsel Maroko came to Los Angeles and met with the Hotel on May 5-6.

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[6] The Hotel's April 9 offer of 2.5 weeks was valued in excess of $4 million. Vol. I, Tr. 40. Local 11's counterproposal on April 9 for 4.5 weeks per year of service had a corresponding value in excess of $7.2 million, and meant that many employees would receive more pay than if they had not been laid off. Plus, Local 11 was demanding substantial payments into its health and welfare fund for all employees, even those who had other jobs and health care coverage. At nearly $800 per month, twelve months' health care

Prior to the May 5-6 meetings, on April 19, Local 11 asserted by letter that there was no "impasse," and it had more proposals to make. Vol. II, GC Ex. 21. The letter did not provide the content, however, of any such proposals. *Id.* Mansoorian testified the Union had "several issues" on which the Union was prepared to move, but was unable – when testifying – to identify any such issues. Vol. I, Tr. 227-228. Although Mansoorian thus gave lip service to the notion that the parties were not at impasse, Local 11 never made any further proposals, either on severance or on contract terms.

The *only* correspondence or proposals made after this date consisted of communications from Local 6, through off-the-record discussions. Vol. I, Tr. 507, 661.

Subsequent Meetings Involved Off-The-Record Discussions That Did Not Show Any Progress on the Issue of Severance Pay. In the May 5-6, 2010 meetings, representatives from Local 6 (Ward and Maroko) and from Local 11 (Walsh and Mansoorian) were present. Vol. I, Tr. 36. The parties met with the express understanding that these negotiations were to be "off the record." Vol. I, Tr. 457, 464, 608, 666. Ward and Maroko asked that the Hotel prepare a complete contract proposal, which was emailed to them prior to the May 5 meeting. Vol. II,

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coverage would cost over $9,000 per employee, or another $2.2 million for the 220 workers. *In short, the parties were over $5 million apart*.

GC Ex. 22; Vol. I, Tr. 34. Ward and Maroko, however, complained about the format of the Hotel's proposal and walked out, putting an end to the May 5 meeting after only a short period of time, and demanding the Hotel prepare a redlined format of the contract changes. Vol. I, Tr. 37, 610-612. A red-lined version was prepared and sent later that evening. Vol. II, GC Ex. 23; Vol. I, Tr. 37, 612. There was never any intent on the part of the Hotel to hide its proposed changes. Vol. I, Tr. 463, 611, 735.

The following day, May 6, Ward and Mansoorian complained about the Hotel's contract modifications, but made *no counterproposals*. Vol. I, Tr. 465-468. Although the Hotel prepared and presented the complete proposal requested by Ward and Maroko (some 50+ pages), it was never discussed. Vol. I, Tr. 615. Instead, Ward and Mansoorian demanded that the terms of the old contract stay the same. Vol. I, Tr. 467-468, 615-616.[7]

With respect to separation pay, the Hotel reiterated its "last, best, and final" offer of April 9. Vol. I, Tr. 618. The Hotel declared it had reached the maximum limit of its economic bargaining ability, as it was likely to total as much as $4.5 million. Vol. I, Tr. 461. The Hotel explained further that this was the largest

[7] The Hotel repeatedly explained that this was not possible because the business model of the Hotel was going to change when it re-opened. Vol. I, Tr. 467, 615-616. In his discussions with Cowdray, Ward, but not

severance pay offer in the State of California for the hotel industry. *Id.* For its part, Local 11 continued to insist on a "guaranteed" recall right, regardless of job qualification. Vol. I, Tr. 468. Indeed, Mansoorian (Local 11) and Ward (Local 6) openly disagreed on this issue. *Id.*

Ward floated the idea that the Hotel should commence paying for medical coverage, in July 2010, for those employees wishing to be recalled, and to pay three weeks' severance for those who wanted severance pay. Vol. I, Tr. 42. This suggestion was not put in writing, nor did the Union ever comply with the Hotel's request that it provide an estimate of how many of its members would accept severance pay, so that Ward's suggestion could be costed out. The suggestion never ripened beyond the "trial balloon" stage. Vol. I, Tr. 41, 126, 474, 703, 740-741. At the end of the day, the Union made no written proposal and no agreements were reached. Vol. I, Tr. 126, 348, 518-519, 616.

The Union Refuses to Estimate a Cost of the Proposed Severance Packages, Likely Because its Own Survey Showed That Most Employees Would Have Accepted the Hotel's Offer. Sometime after these meetings, Ward expressed concern to Stokes that he believed the Hotel was just trying to "bust" the Union. Vol. I, Tr. 473. However, Stokes candidly told Ward that if he believed

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Mansoorian, agreed that business-model-related changes to the contract would be appropriate. Vol. II, Resp. Ex. 1.

that an overwhelming majority would reject any severance offer, and would thereby want their jobs back at re-opening, he could simply allow a then-pending decertification petition to go forward to an election (*i.e.*, the suggestion being that if Local 11 was so confident regarding a rejection of severance pay in lieu of returning upon reopening, it could win the vote and be assured of a certified bargaining unit). Vol. I, Tr. 473-474. Following up on earlier requests to Local 11, Stokes asked Local 6 to determine how many would accept severance pay, as that information would allow the Hotel to determine the overall cost of the severance plan. Vol. I, Tr. 474. The Union did not pursue this route and never provided the information. Vol. I, Tr. 703, 740-741. Local 11's internal survey, a portion of which was provided to the Hotel pursuant to subpoena, suggested that a majority of the employees wanted to accept the Hotel's severance plan, contrary to the Union's representations during negotiations. Vol. II, Resp. Ex. 12. And, in fact, a large majority of the employees *did* accept the severance when it was finally offered.

E. *The Union Starts Bypassing the Hotel's Appointed Bargaining Representatives.*

On May 21, 2010, Stokes and Fischer met with Ward and Maroko. Vol. I, Tr. 42-43. Ward accused the Hotel of taking a regressive bargaining position on May 5-6 in Los Angeles with respect to the successor CBA issue. Vol. I, Tr. 44.

On May 26, 2010, Ward sent an angry letter to Christopher Cowdray, Dorchester's Chief Executive Officer, complaining about Stokes. Vol. II, Resp. Ex. 14.[8] Cowdray responded on May 27, reiterating his disappointment that Local 11 was taking positions contrary to those previously expressed by Ward. Vol. II, Resp. Ex. 15(b).

Thereafter, Local 6 attempted to circumvent all representatives of the Hotel and requested the assistance of David Rothfeld, an attorney representing the New York Hotel Employers Association, who had a longstanding relationship with Ward. Vol. I, Tr. 45, 479-480. On June 4, Rothfeld, claiming to have had discussions with Ward, circulated a proposal that he suggested would be a framework for resolving both the severance and contract issues. Vol. II, GC Ex. 25; Vol. I, Tr. 45, 483. This proposal called for significantly more money than the Hotel had previously proposed — increasing the amount of severance pay to three weeks per year of service — and was, otherwise, all but identical to the verbal suggestion made by Ward on May 6. Vol. I, Tr. 483, 665.

Later that same day, *after* the Hotel received Rothfeld's proposal, Ward held a meeting with the employees of the New York Palace. He berated Cowdray as a

[8] The Union was fully aware that Preonas with Seyfarth Shaw was the Hotel's bargaining representative and they were directed not to communicate with any Hotel representatives about these issues. Vol. II, Resp. Ex. 16; Vol. I, Tr. 559.

"weak [CEO who] doesn't have the backbone to control his managers," berated Stokes as an untrustworthy "union-buster" with "horseshit stories," and berated Dorchester as an unethical company. Vol. I, Tr. 482-483; Vol. II, Resp. Ex. 22, pp. 6, 12-13. In addition, Ward expressly stated that the June 4 proposal by Rothfeld (whom Ward had recruited to get involved) was "wholly unacceptable," "insulting in the extreme," "draconian," and "way too little, way too late." Vol. II, Resp. Ex. 22.

Upon learning of Ward's rejection of the June 4 proposal by Rothfeld, and of Ward's offensive remarks, Stokes advised Local 6 that the Hotel would not accept the terms proposed by Rothfeld. Vol. II, GC Ex. 26; Vol. I, Tr. 483. On June 7, Local 6 once again circumvented the Hotel's representatives by sending a response directed to Cowdray, through Rothfeld. Vol. II, GC Ex. 27; Vol. I, Tr. 56. When Tim Lee, the Hotel's General Manager, learned that Rothfeld had attempted to make proposals on behalf of the Hotel, and that Local 6 was circumventing the Hotel's actual representatives, he sent a letter to Rothfeld notifying that neither he nor his firm represented the Hotel. Vol. II, Resp. Ex. 5.

Only after the June 4 proposal was withdrawn did Local 6 try to get it reinstated. After the June 4 offer was withdrawn, both Preonas and Stokes attempted to meet with Mansoorian; phone messages left with her, however, were not returned. Vol. I, Tr. 486, 620-621. A meeting was finally set for June 9, but

Mansoorian did not show. The meeting was held instead with Maroko only. *Id*. At this meeting, Maroko first made it clear that the meeting was "off the record." Vol. I, Tr. 622. Maroko then asked for reinstatement of the June 4 Rothfeld offer, but Preonas and Stokes refused to do so. Vol. I, Tr. 487-488. Stokes and Preonas asked Maroko what Local 11 "really wanted." Vol. I, Tr. 623. Maroko then began to discuss Local 11 in third-party terms, describing Local 11 as "very difficult to deal with," "very doctrinaire" and "not very practical." Vol. I, Tr. 623-624. In order to convince the Hotel to reinstate the offer, Maroko stated that he was working on trying to get "them" (Local 11) to agree to the proposal, and that "he could do more than [the Hotel could] do with Local 11." Vol. I, Tr. 488-490. In particular, Maroko stated that Section 2B, a permissive card check provision of the agreement, was of vital importance to Local 11 and he did not think he could get them to drop it, but would try. Vol. I, Tr. 624. Notwithstanding the Hotel's clear refusal to reinstate the more expensive June 4 offer, Vol. I, Tr. 491-492, 628, Maroko submitted an off-the-record "counter-proposal" to that proposal. Vol. II, GC Exs. 30, 31; Vol. I, Tr. 736. Maroko claimed this counter-proposal was "essentially" an acceptance of the withdrawn June 4 offer, even though it contained different terms regarding job classifications, subcontracting, and other provisions. Vol. I, Tr. 59-60, 490-491; *compare* Vol. II, GC Ex. 25, ¶¶ 2, 4, 8, 9, 11 *with* Vol. II, GC Ex. 30, ¶¶ 2, 4, 8, 9, 11.

On June 10, the Hotel made yet another effort to resolve the severance pay issue, by making an off-the-record response to Maroko's off-the-record counterproposal. Vol. II, GC Ex. 32; Vol. I, Tr. 494-495. This proposal presented two alternatives:

- The first option provided 2.5 weeks of severance per year of service for employees not wishing to have recall rights, coupled with proposed terms for a successor CBA.
- The second option stated that the Hotel would increase the severance pay formula to three weeks per year of service, provided the offer was presented "immediately" to employees, and that any discussion toward a successor CBA would be held *subsequent* to the determination of who had accepted the severance pay offer.

Vol. II, GC Ex. 32. Vol. I, Tr. 498-499, 502.

On June 11, Peter Fischer on behalf of the Hotel made several attempts to contact Maroko. *See* Vol. II, GC Exs. 33, 46, 47. Maroko never responded, nor did he communicate any acceptance of either of the June 10 options. Vol. I, Tr. 500-501, 628-630. Meanwhile, Local 11 did not inform its members of the June 10 proposal or present it for ratification. Vol. I, Tr. 354-355. In fact, there is no indication of any kind that Local 11 even knew of the June 10 proposal. Vol. I, Tr. 500-501, 628-630. Thus, the Union's claim, at the hearing, that it attempted to

accept the second option – severance pay separate from negotiations regarding a successor CBA – is unsupported by any evidence in the record.

Indeed, quite to the contrary, Ward and Maroko continued to demand during this window of time that the Hotel present another *complete* contract, proposal to see if the parties could "bridge the gap" and reach agreement on a new contract tailored to the needs of the Hotel. Vol. I, Tr. 74-75, 500, 504-505, 629-632; Vol. II, GC Ex. 34. *Id*. In response to this demand, a meeting was set for June 21, prior to which the Hotel's representatives spent many hours crafting a new proposal to address the Union's concerns and to develop a contract suitable to the new operations. Vol. II, GC Ex. 34; Vol. I, Tr. 629. The entire contract was discussed in great detail over many hours at this June 21 meeting. Vol. I, Tr. 630-632.

Once again, at the June 21 meeting, no one from Local 11 was in attendance. Vol. I, Tr. 630. This absence of Local 11 representatives, combined with the fact that Local 11 had twice rejected concessions by representatives of Local 6 at earlier meetings, show clearly that these meetings were not indicative of any progress in the negotiations. These were off-the-record, informal discussions, as indicated by Local 11's absence. Although these discussions were indeed aimed at breaking the impasse, these discussions proved utterly futile.

Ward again asked, on June 21, whether the Hotel would put the June 4 Rothfeld proposal back on the table. In the context of its June 10 effort at breaking

impasse (by the making of the alternative proposals) having been rejected, the Hotel refused, and said it was not budging from its April 9 last, best and final offer on severance. Vol. I, Tr. 630-631. Neither party made any new proposals with regard to severance, nor was any agreement reached on the issue of a successor CBA. Vol. I, Tr. 162, 506, 630-632.

At the conclusion of the June 21 meeting, Ward said simply: "We're done." Vol. I, Tr. 506, 632. Thus, at the end of this meeting, it was clear the Union was still pursuing a new CBA tied to an agreement on severance, and was seeking no less than three weeks' severance with a guaranteed right of recall, regardless of qualifications. The Union never communicated a response, much less agreement, to the alternative June 10 proposals. For its part, the Hotel was unwilling to move off its April 9 last, best, and final offer of 2.5 weeks of severance pay only for those agreeing to waive a guaranteed position. Vol. I, Tr. 501-503.

On June 22, Maroko once again bypassed the Hotel's bargaining representatives by sending a document entitled "counterproposal" to Rothfeld. Vol. II, GC Ex. 35(a).[9] This counterproposal once again combined the severance and contract issues into one document, and contained terms never proposed or accepted by the Hotel. Vol. I, Tr. 508- 510, 633. It was not clear whether this was

[9] The proposal was submitted via email containing an attachment that was entitled "belaircounterprop52110.doc." Vol. II, GC Ex. 35(a).

a formal proposal, as it was sent to Rothfeld and not to Preonas. Vol. II, GC Ex. 35(a); Vol. I, Tr. 678. While Maroko denied having seen the letter from Tim Lee to David Rothfeld stating that he did not represent the Hotel Bel-Air, Vol. II, Resp. Ex. 5, on cross-examination Maroko conceded that Rothfeld had informed him he would no longer be involved. Vol. I, Tr. 163.

In addition, the June 22 "proposal" was also regressive from Maroko's June 9 proposal, placing the parties even further apart. Significantly, the proposal reinstated the Section 2(B) demand for card check recognition at the Hotel's sister property, the Beverly Hills Hotel (also managed by Dorchester Collection) and attached two letters threatening to organize the Beverly Hills Hotel employees. Vol. II, GC Ex. 35(a), (b). Local 6 had previously stated that this section would not apply. Vol. II, GC Ex. 30; Vol. I, Tr. 636, 725-727. In short, the Maroko email simply confirmed that the parties were at impasse.

On June 25, Preonas wrote to Maroko, asking for clarification about several points in the June 22 "proposal." Vol. II, GC Ex. 36. However, neither Maroko nor anyone else from Local 6 or Local 11 ever responded to this request for clarification. Vol. I, Tr. 635. Nor did anyone from Local 6 or Local 11 advise their members or the Hotel that an agreement had been reached on severance and recall — Local 11 took no steps whatsoever. Vol. I, Tr. 158-159, 363-364, 508-509, 635.

Summary. Local 11 did not make any proposals or even communicate with the Hotel after April 9. On June 21, Ward said "we're done." Vol. I, Tr. 506, 632. The June 22 email from Maroko represented a widening of differences. Local 11 took no action toward even hinting that a resolution was possible. Vol. I, Tr. 158-159, 363-364, 508-509, 635. Maroko failed even to respond to the Hotel's last request for clarification concerning the June 22 counterproposal. Vol. I, Tr. 635. With bargaining at a standstill, it was plain the parties were unable to agree on the terms of a severance pay plan.

The Hotel Proceeds to Implement. On July 7, more than eleven months after it first offered to bargain over the effects of the closure, the Hotel wrote to Local 11, stating that it was implementing its last, best & final offer April 9 & 12, which meant the Hotel would proceed to make the individualized offers of severance pay in exchange for a release of any right to recall – *i.e.*, in the same manner as presented at the April 9 meeting, when the Hotel showed up with checks and releases in hand. Vol. II, GC Ex. 37.

Thereafter, approximately 179 bargaining unit members (out of a total of 220-225) accepted the severance. Vol. I, Tr. 240.

SUMMARY OF THE ARGUMENT

The Hotel made a good faith effort to break the April 9, 2010 impasse by engaging in informal, "off the record" discussions in New York City. Those discussions were largely held among individuals who weren't direct representatives of the parties. Local 11 barely participated in discussions after the month of May, and certainly did not feel bound by these discussions, as it made clear by reneging on apparent concessions on more than one occasion.

The Board's holding that impasse was not reached, to the extent it is premised on its findings related to the "off the record" discussions, is not supported by the evidence of what actually occurred in those discussions. Further, a holding that impasse was not reached, based on the facts related to the off-the-record discussions in this case, would set bad precedent. Off-the-record discussions can be a useful tool for parties seeking to break impasse, as it allows parties to freely explore alternatives without committing themselves. For the Board to then turn around, and have those discussions used against a party as support for a finding of "no impasse," would have the unfortunate effect of chilling future negotiators from utilizing the useful tool of discussing alternatives off the record. This Court should not affirm a decision whose effect would be to chill future efforts to break impasse and reach agreement. Such an affirmance would be antithetical to the purposes of the Act.

In addition, the parties were fundamentally far apart, and remained far apart, on the essential issue of severance pay. The parties never bridged the gap over the issue of whether all employees would receive severance, or just those willing to waive recall rights, and never bridged the gap of reaching a separate severance agreement that was not tied to a new CBA. In addition, the parties remained far apart on the amount of severance pay. Based on the authorities discussed below, the parties were at impasse on this one essential issue.

The Petitioner was therefore lawfully entitled to implement, and did so only after giving advance notice. The implementation did not amount to unlawful direct dealing, as the Petitioner simply issued the checks and releases directly to the employees to enable them to make individualized decisions, as had been contemplated all along.

STANDING

Petitioner has standing as the employer petitioning for a review of a written order of the National Labor Relations Board. 29 U.S.C. § 160(f).

ARGUMENT, STANDARD OF REVIEW AND CITATION OF AUTHORITIES

A. This Court Should Refuse Enforcement of the Board's Order Because it is Not Supported by Substantial Evidence and Fails to Effectuate the Purposes of the Act.

Although Section 10(e) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(e), provides that the Board's findings as to the facts "if supported by evidence, shall be conclusive," this means evidence "which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred." N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 299-300 (1939). "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Id*. at 300 (citation omitted).

Thus, although this Court ordinarily defers to the Board's fact-finding regarding the existence of a bargaining impasse, it will do so only if it is "satisfied that the Board's findings are supported by substantial evidence on the record considered as a whole." TruServ Corp. v. N.L.R.B., 254 F.3d 1105, 1115 (D.C.

Cir. 2001) (rejecting the Board's conclusion that no impasse was reached due to suspect factual findings).

The primary purpose of this Court's review is to ensure that the Board's order properly effectuates the purposes of the National Labor Relations Act:

> [T]his court is a reviewing court and does not function simply as the Board's enforcement arm. It is our responsibility to examine carefully both the Board's findings and its reasoning, to assure that the Board has considered the factors which are relevant to its choice of remedy, selected a course which is remedial rather than punitive, and chosen a remedy which can fairly be said to effectuate the purposes of the Act.

Avecor, Inc. v. N.L.R.B., 931 F.2d 924, 928 (D.C. Cir. 1991) (citation omitted). The purposes of the Act include "the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act." N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240, 257-58 (1939). "Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground. … The Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining." N. L. R. B. v. Ins. Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 485 (1960) (citation omitted). Good faith on the part of the union is also required. "Unions obviously are formed for the very purpose of bargaining collectively; but the legislative history makes it plain that Congress was

wary of the position of some unions, and wanted to ensure that they would approach the bargaining table with the same attitude of willingness to reach an agreement as had been enjoined on management earlier. It intended to prevent employee representatives from putting forth the same 'take it or leave it' attitude that had been condemned in management." *Id.*, 361 U.S. at 487.

Off-the-record discussions can often effectuate these purposes by enabling the parties to consider and set forth ideas that might or might not yield a path to agreement without being committed to those positions. The Board's order in the present case reflects both a failure to consider all the evidence of record, and a lack of concern for its effect on the usefulness of off-the-record discussions to enhance bargaining. For those reasons, Petitioner respectfully requests that this Court grant its petition for review and deny enforcement of the Board's order.

B. The Board Erred by Relying on the "Off the Record" Discussions in New York to Find No Impasse, Because Those Discussions Were Not Among All the Necessary Parties and Were Intended to be Informal and Off the Record.

The Board and the ALJ both looked at the off-the-record discussions in New York between October 2009 and June 2010 as essentially equivalent to collective bargaining meetings, for purposes of determining whether impasse had been reached. But, to regard these discussions as a simple continuation of formal negotiations, as the Board did here, is to negate the purpose of having such

informal discussions. Off-the-record meetings free the parties to "throw out ideas, [and] argue about things that might not be as easy to overcome if you made them public to everybody in a formal negotiation." Vol. I, Tr. 443. Similarly, parties are free to make statements that would be embarrassing if put "on the record" by the other side. For example, on February 5, 2010 in New York, Peter Ward's off-the-record "proposal" was to the effect that severance pay would be four weeks per year and that those who accepted would waive any right to recall, and that those who wanted to be recalled would receive no severance. Yet, five days later, Local 11 made a completely different proposal before the full bargaining committee in Los Angeles, demanding more money and demanding severance for employees who would be guaranteed recall. Had the Hotel's representatives at the February 10 meeting told the assembled group of workers that the Union had previously agreed to completely different concessions, the bargaining relationship would have been poisoned. Vol. I, Tr. 593, 596, 598.

The ALJ accepted the view, advocated in Petitioner's post-hearing brief, that "off the record [as understood by the parties when meeting under that guise] meant that the parties could freely discuss settlement but that the parties were not bound by the discussions and that they were not officially negotiations." Vol. III, 8.12.11 Decision and Order at 3. Yet, the ALJ and the Board relied explicitly on those discussions to find that impasse had not been reached. This was error.

C. The Board Erred in Finding That Impasse on the Severance Issue Had Not Been Reached.

The Hotel's last, best, and final offer with respect to severance was made on April 9, 2010 and affirmed on April 12, 2010. At no time thereafter did the parties discuss severance as a separate issue, and any apparent concessions on that issue were tied to tit-for-tat concessions on a new CBA, on which the parties never reached agreement. Thus, impasse *on the severance issue* was reached in April.

"Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." Taft Broadcasting Co., WDAF AM-FM TV, 163 NLRB 475, 478 (1967). In Taft, the Board found that impasse existed because the parties had bargained hard and in good faith for six months. "However, after more than 23 bargaining sessions, progress was imperceptible on the critical issues, and each believed that, as to some of those issues, they were further apart than when they had begun negotiations." *Id*. The present case reveals a similar pattern; even if one includes the off-the-record discussions with Local 6 and the attorneys representing the New York Palace Hotel, there was little or no progress made on

the severance pay issue. Local 11 reneged on every concession made by Local 6 related to severance pay, and both unions continued to insist on tying the severance issue to negotiations for a new collective bargaining agreement. The only issue on which the Petitioner declared impasse – the severance package – never found any common ground between the parties, even when it was discussed. *See, e.g.*, Laurel Bay Health & Rehab. Ctr. v. N.L.R.B., 666 F.3d 1365, 1374 (D.C. Cir. 2012) (where parties were at loggerheads regarding a specific important issue, the fact that potential movement existed in other areas did not preclude finding of impasse); *see also*, N.L.R.B. v. Yama Woodcraft, Inc., 580 F.2d 942, 945 (9th Cir. 1978), citing American Fed. of Television & Radio Artists v. N. L. R. B., 129 U.S. App. D.C. 399, 404, 395 F.2d 622, 627 n. 13 (1968) ("It cannot be doubted that a deadlock on one critical issue can create as impassable a situation as an inability to agree on several or all issues.").

In addition, as in TruServ Corp. v. N.L.R.B., 254 F.3d 1105, 1118 (D.C. Cir. 2001), "while the [U]nion sought to continue talks, it did not offer a new proposal or indicate a willingness to compromise further on any specific issue." Karine Mansoorian's assertion, at the hearing, that the parties were not at impasse and that the Union had more proposals to make is without support in the record. The Union never made a proposal on severance that did not tie it to reaching a successor CBA. By the time the Hotel implemented its severance proposal, the parties were still

millions of dollars apart on severance, while the Union continued to "resist[] movement in the Company's direction." *Id*. Moreover, the Union never allowed the employees to vote on the Hotel's proposed severance package and, indeed, claimed that the majority of employees would reject it, though the facts show clearly otherwise. *Cf*. TruServ, *supra* (Union's failure to submit company's final offer to a vote was an indication of impasse).

The ALJ's citation, at Vol. III, 8.12.11 Decision and Order at 8, to the proposition that "both parties must believe they are at the end of their rope" – in order to find impasse – is misleading, to the extent that he is in fact relying only on mere self-serving testimony from the Union. Such self-serving testimony cannot be relied upon in the face of plain, contrary facts, which, in the present case, are (1) the parties were farther apart on a collective bargaining agreement by the end of June than they were in May, and (2) the Union had *never* been willing to negotiate severance apart from the negotiations for a new agreement. *Cf*. TruServ, *supra*, 254 F.3d at 1117 ("[T]he Union's self-serving statement on August 29 that the parties were not at impasse and the Union's vacuous request on August 31 for additional meetings is insufficient to demonstrate the Union's desire to pursue further negotiations."); Erie Brush & Mfg. Co. v. NLRB, 700 F.3d 17, 22 (D.C. Cir. 2012) ("a vague request by one party for additional meetings, if unaccompanied by an indication of the areas in which that party foresees future

concessions, is . . . insufficient to defeat an impasse where the other party has clearly announced that its position is final," *citing*, TruServ); Serramonte Oldsmobile, Inc. v. N.L.R.B., 86 F.3d 227, 233 (D.C. Cir. 1996) ("The Board itself has indicated that a party's 'bare assertions of flexibility on open issues and its generalized promises of new proposals [do not clearly establish] any change, much less a substantial change' in that party's negotiating position," *citing*, Holiday Inn Downtown-New Haven (Civic Motors), 300 NLRB 774, 776 (1990); In Re Matanuska Elec. Ass'n, Inc., 337 NLRB 680, 683 (2002) (where the union had refused to meet during certain periods and had shown no urgency in attempting to reach agreement, a finding of impasse was appropriate after seven months of bargaining).

At the conclusion of the June 21 meeting, the Local 6 representative, Peter Ward, whom Local 11 claimed at the hearing spoke for Local 11, said, "We're done." Vol. I, Tr. 506, 632. Regardless of the Union's public statements, "[i]mpasse in negotiations is a fact specific determination that further bargaining would be futile, and absent some intervening act (for instance economic pressure) there is no reasonable likelihood of the parties reaching an agreement." *Id*. at 1118.

As in TruServ, *supra*, "the record demonstrates that the Company … bargained in good faith, made substantial concessions, and ultimately reached a

point when it was simply unwilling to compromise further." The Board's conclusion that the parties were not at impasse *with respect to the severance issue* was based merely on "its intuitive belief", not the facts of record. *Id*. at 1112. *See also,* Dallas Gen. Drivers, Warehousemen & Helpers, Local Union No. 745, Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. N. L. R. B., 355 F.2d 842, 845 (D.C. Cir. 1966) ("[T]he fact that the parties resume discussions on issues other than wages after the date of the wage cut is not incompatible with a finding that an impasse on the wage issue had been reached by that date."); Excavation-Constr., Inc. v. N.L.R.B., 660 F.2d 1015, 1019 (4th Cir. 1981) (parties deferred negotiations on a central sticking point while multi-employer negotiations continued, in the hopes that a way of breaking impasse would occur; when it did not, the employer was justified in implementing its final offer on the central provision).

The ALJ's findings of fact were incomplete and in some ways inaccurate. He ignored completely, for example, the fact that Local 11 did not participate in any meetings after May 6, and had twice reneged on concessions made by Local 6. It is simply not possible to conclude that Local 11, the actual party to the negotiations, showed any movement whatsoever after May 6, particularly given that Local 11 remained largely absent from any direct discussions. "It has been long established that it is the duty of an employer to bargain solely with the

statutory representative and no other person or group." Spriggs Distrib. Co., 219 NLRB 1046, 1049 (1975).

Indeed, Local 11's avoidance of bargaining permitted the Hotel to implement its final severance offer even in the absence of impasse. *See, e.g.*, N.L.R.B. v. Pinkston-Hollar Const. Services, Inc., 954 F.2d 306, 311 (5th Cir. 1992), citing N.L.R.B. v. Auto Fast Freight, Inc., 793 F.2d 1126, 1129 (9th Cir. 1986) ("Where, upon expiration of a collective bargaining agreement, the union has avoided or delayed bargaining, and the employer has given notice to the union of the specific proposals the employer intends to implement, the employer may unilaterally implement the proposals *without first bargaining to impasse*." [emphasis added]). *See also*, Saunders House v. N.L.R.B., 719 F.2d 683, 686-87 (3d Cir. 1983) (emphasis added), citing Alsey Refractories Company, 215 N.L.R.B. 785, 787 (1974) ("The Board has defined impasse as a situation in which one party is 'warranted in assuming ... *that the [other party] had abandoned any desire for continued negotiations*, or that further good-faith bargaining ... would have been futile'."). Local 11 did not in fact delegate authority to Local 6, or else openly revoked it, as is apparent from the fact that it repeatedly ignored off-the-record concessions made by Local 6, and even openly disagreed with representatives of Local 6 at meetings in which both participated. *See, e.g.*, Restatement (Third) Of Agency § 3.10(1) (2006) ("Notwithstanding any agreement

between principal and agent, an agent's actual authority terminates if the agent renounces it by a manifestation to the principal or if the principal revokes the agent's actual authority by a manifestation to the agent. A revocation or a renunciation is effective when the other party has notice of it."). Because Local 6 was in fact unable to negotiate an agreement on behalf of Local 11, the Board's conclusion that the off-the-record discussions with Local 6 showed the possibility of movement, so as to preclude impasse, was in error. *Cf.* Spriggs, *supra* (employer could not negotiate a binding agreement with an individual lacking real or apparent authority to negotiate such an agreement).

The ALJ made other incomplete findings as well. For example, he briefly mentioned the October 16 letter from Chris Cowdray on behalf of the Hotel, but failed to point out this letter "emphasized the critical importance of resolving the severance pay issue as 'stage one' of any resolution …. [and reminded] that the Hotel acceded to the Union's request of offering the option of waiving severance in favor of rehire rights …." Vol. II, Resp. Ex. 2.

Moreover, the ALJ's findings belie his own conclusions. First, he justified his finding of no impasse, in part, by saying that in June 2010, "the only thing lacking was a clear indication from the Union that it was willing to agree to an agreement on the Hotel's closure in the absence of agreement on a collective bargaining agreement," as if that were a minor point. Vol. III, 8.12.11 Decision

and Order at p. 7. In fact, that *was* the point. As Local 11's Mansoorian admitted, Local 11 never once made a proposal that did not tie the issue of effects bargaining to the negotiation of a new agreement. Vol. I, Tr. 293. Second, the ALJ acknowledged that the discussions in May 2010 did not even address the severance issue. *See* Vol. III, 8.12.11 Decision and Order at p. 4 (describing the meetings of May 5, 6 and 21). Nor was severance discussed on June 21, the final meeting. And then, when Local 6 sent a new proposal on June 22, the Hotel followed up, on June 25, with some questions which were never answered. *Id.* ("Maroko did not respond"). The Hotel then waited 13 days, until July 7, before implementing.

After months of attempting to move forward on the severance issue, after repeatedly explaining both to Local 11 and Local 6 that a successor CBA could only be reached if the parties could first come to agreement on the severance issue, the Hotel was not obligated to wait any longer to implement the severance proposal. *See* Excavation-Constr., Inc., *supra*.

D. The Hotel Did Not Engage in Direct Dealing When it Implemented the Terms of the Offer That Had Been Made to the Union.

Because the Hotel had bargained to impasse with the Union on the severance issue, the Hotel did not unlawfully bypass the Union when it implemented its last, best, and final offer regarding severance pay on July 7, 2010. The implementation was effected in the precise manner contemplated by the parties throughout the

negotiations, and in the precise manner proposed by the Hotel – *i.e.*, via delivery of releases and severance checks to employees for the purpose of allowing each to make their individualized decisions.

Direct dealing does not occur when the employer communicates with employees about a proposal that has already been made to the Union. Endo Laboratories, Inc., 239 NLRB 1074, 1084 (1978) ("[N]o information was submitted to the employees which was not previously submitted to the Union in prior negotiations. No new benefit offers were extended in the communications. There was no direct dealing with the employees or other attempts to bargain with them."); *see also*, Pratt & Whitney, *supra*, 789 F.2d at 135 (no direct dealing occurred where "[t]he information was first given to the Union; the language was non-coercive; and the Union was consistently acknowledged as the legitimate bargaining representative."); United Technologies Corp., 274 NLRB 609, 610 (1985) (no direct dealing where the employer was simply communicating with its employees regarding a proposal already made to Union); Stokely-Van Camp, Inc., 186 NLRB 440, 449-450 (1970) (the Board found no unlawful direct dealing or bypassing the union where the employer conducted meetings with its employees for the purpose of discussing and clarifying its bargaining proposals).

The Hotel did not bypass the Union; it simply implemented its proposal in the matter always contemplated. The parties had always contemplated that each

employee would be permitted to choose whether or not to accept severance pay. Thus, the fact that the Hotel's implementation of the severance package necessitated communication with the employees does not render it unlawful. In Adolph Coors Co., 235 NLRB 271 (1978), the employer communicated with its employees to inform them of the implementation of its best offer made prior to impasse. The Union alleged that some of the terms were misrepresented, but the Board nonetheless held that the communication was non-coercive and did not bypass the Union, and therefore was not an unfair labor practice.

"Improper direct dealing is characterized by actions that persuade employees to believe that they can achieve their objectives directly through the employer and thus erode the union's position as the exclusive bargaining representative." American Pine Lodge, *supra*, 164 F.3d at 875 (citation omitted). "Another way to frame the question of direct dealing is whether the employer has chosen to deal with the Union through the employees, rather than with the employees through the Union." *Id*. (citation, some punctuation omitted). Neither of these characterizations applies in the present case, where the Hotel bargained with the Union for nearly a year of on-the-record and off-the-record negotiations, and where it finally implemented an offer that the Union had been in possession of for months.

CONCLUSION

Petitioner respectfully requests that this Court grant its petition for review and deny enforcement to the Board's Order of September 27, 2012.

Respectfully submitted, this 17th day of February, 2015.

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Dated: February 17, 2015 /s/Karl M. Terrell
Counsel for Petitioner

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of February, 2015, I caused this Petitioner's Initial Brief to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 17th day of February, 2015, I caused the required copies of the Petitioner's Initial Brief to be hand filed with the Clerk of the Court.

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ADDENDUM

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Addendum

29 U.S.C. § 153 - NATIONAL LABOR RELATIONS BOARD

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) Annual reports to Congress and the President

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act

(1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or

(2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 160 - PREVENTION OF UNFAIR LABOR PRACTICES

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) ofsection 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub. L. 98–620, title IV, § 402(31),Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such

petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158 (b) of this title, or section 158 (e) of this title or section 158 (b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158 (b)(7) of this title if a charge against the employer under section 158 (a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization

(1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158 (b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.